Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 394, AFL-CIO and Arok Construction Co., Inc. and International Brotherhood of Carpenters and Joiners of America, Local 1327. Case 28-CD-204

16 November 1983

DECISION AND DETERMINATION OF DISPUTE

By Chairman Dotson and Members Zimmerman and Hunter

This is a proceeding under Section 10(k) of the National Labor Relations Act following a charge filed by Arok Construction Co., Inc. (the Employer), alleging that Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 394, AFL-CIO (the Plasterers), had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Brotherhood of Carpenters and Joiners of America, Local 1327 (Carpenters).

Pursuant to notice, a hearing was held before Hearing Officer Bruce P. Kettler on 12, 13, 14, and 17 January 1983. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed. On the entire record in this proceeding, the Board makes the following findings.

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer is a California corporation with its principal office and place of business in Phoenix, Arizona. During the past 12-month period, which period is representative of its annual operations generally, the Employer purchased and caused to be transported in interstate commerce goods, materials, and supplies valued in excess of \$50,000 directly from other firms located outside the State of Arizona, which goods, materials, and supplies were delivered to the Employer's projects located within the State of Arizona. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7)

of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Plasterers and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. The Work in Dispute

The work in dispute generally involves the installation of all types of polystyrene panels to the exterior walls of buildings. The panels are part of the building's insulation system. Specifically, the work in dispute consists of reading plans, doing the layout, drawing the starting line, mixing the cement and adhesive, applying that substance to the panels, and placing or "sticking" panels against the wall.

B. Background and Facts of the Dispute

The Employer is engaged in the building and construction industry as a lathe, metal, stud, drywall, and plastering contractor. One of the Employer's jobsites is the G.T.E. Building at 52d Street in Tempe, Arizona, where the Employer has a subcontract to install an insulation system known as the Dryvit System. This system requires the attaching of panels made of a styrofoam material, technically called polystyrene, to the walls of a building. Various types of plaster materials are then applied to the panels to provide the finished surface of the building's exterior walls. In this process, plans are read, measurements are taken, the job is laid out, and a starting line is drawn. Cement is mixed with an adhesive and applied to the styrofoam panels and the panels are placed on the exterior walls. After the adhesive has dried, the plasterers prepare the panels for the application of plaster materials, and apply those materials to the entire surface of the building's exterior walls.1

Various firms, including Dryvit, Surewall, Nuwall, R Wall, and STO, manufacture the adhesive and wall finish materials. Each manufacturer's process is similar. At the time of the dispute, the Employer was using materials manufactured by Dryvit.

Charles Brickey Sr., contract coordinator for the Employer, testified that he first realized that there might be a dispute over the assignment of the Dryvit work at the G.T.E. site in either late July or August 1982.² At that time the Employer was

¹ All parties agree that plasterers are entitled to the work performed on the panels after they are affixed to the exterior walls.

² All dates are in 1982 unless otherwise indicated.

engaged in contract negotiations with the Carpenters for a contract which was signed 20 October and made retroactive to 1 June.³ The Employer realized that both the Carpenters and the Plasterers had a colorable claim for the assignment of Dryvit work. As a result, Brickey and Gary Jost, president of the Employer, decided that they would assign the Dryvit work to a composite crew. Thus, by letters dated 18 October 1982, the Employer informed the Unions that the Employer had chosen to use a composite crew of 50 percent plasterers and 50 percent carpenters/lathers for the G.T.E. project.

Donald Parker, secretary-treasurer and business agent of the Plasterers, testified that he received that letter, but that he was first informed of the assignment on 18 or 19 October 1982 at a meeting between union officials and all drywall plastering contractors. At that meeting Parker informed Jost that, if he put lathers on plasterers' work, there would probably be problems because the Employer would be in violation of its labor agreement with the Plasterers. Parker also testified that he informed Jost that the plasterers would be pulled off the G.T.E. project if the carpenters handled the Dryvit work.⁴

On 6 December, Jesse Cooper, vice president of the Employer who was in charge of field operations, started the work at the G.T.E. site at approximately 7 a.m. Cooper testified that he had one carpenter and two plasterers assisting him that day. The two plasterers were putting the mesh at the bottom of the trim and installing the panels (part of the work in dispute), while the carpenter was putting on trim (work not in dispute) and doing some layout work (which is in dispute). After the carpenter finished the trim work, Cooper told him to help put on the panels. That carpenter left but soon returned to tell Cooper that Plasterers business representative Foltz told him if he put any foam on Foltz would pull the plasterers off the job. Shortly thereafter Cooper confronted Foltz. He asked Foltz what the problem was. According to Cooper, Foltz said, "Well, if you put the foam on, I'm going to pull my men off the job." Thereupon, Cooper instructed the carpenters to put on the foam. Foltz then instructed the plasterers to finish the materials they had and leave the worksite. At approximately 9 a.m., the plasterers left the site and

did not return for 2 or 3 days.⁵ During the interim, the Employer used carpenters to perform the work, including work which concededly belongs to the plasterers. Once the plasterers returned, the carpenters continued to perform the disputed work while the plasterers resumed the work which all parties agree belong to them.

C. The Contentions of the Parties

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated and that there exists no voluntary method for settling the dispute. It alleges that the factors of relative skills, economy and efficiency, and employer preference favor an award to its employees represented by the Carpenters, and that the Carpenters are best able to meet its manpower needs.

The Carpenters did not file a brief, but, at the hearing, took essentially the same position as the Employer.

The Plasterers argues that the Board should not proceed to a determination of dispute in this case. It claims there is no reasonable cause to believe that it engaged in coercive conduct within the meaning of Section 8(b)(4)(D) of the Act, and that its action in taking employees off the worksite was lawful as it was done solely to protest the Employer's violation of its contract by assigning its work to carpenters. The Plasterers maintains that the parties have an agreed-upon method for the voluntary adjustment of the dispute in the Impartial Jurisdictional Disputes Boards (IJDB) in the construction industry. The Plasterers further contends that an interunion agreement assigns the work to it, and that industry, area, and trade practice and relative skills favor an award of the disputed work to employees repesented by it.

D. Applicability of the Statute

Before the Board may proceed with a determination of dispute under Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute. As described above, the Plasterers demanded that the Employer change its original assignment from a composite crew of 50 percent plasterers and 50 percent carpenters/lathers to a crew composed solely of plasterers. It threatened to pull the employees represented by the Plasterers off the

³ The Employer also had a collective-bargaining agreement with the Plasterers.

⁴ In response to the Employer's letter to the Carpenters informing it of the assignment of a composite crew, the Carpenters business manager, Bob Moyer, by letter informed the Employer that the Carpenters would abide by the job assignment. Moyer's letter also stated that the Carpenters/Lathers still claimed total jurisdiction for application of foam for Dryvit Systems.

⁵ Foltz also pulled the plasterers off the Employer's crew on the Dobson Shores project in Phoenix, Arizona, in support of the dispute on the G.T.E. project. There was no Dryvit work on that project.

G.T.E. project and did pull the employees off this site as well as another one of the Employer's worksites. The Plasterers does not deny that at least one object of its actions was to force or require the Employer to assign the disputed work to persons represented by the Plasterers rather than to those represented by the Carpenters. Accordingly, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

The Plasterers contention that the parties have an agreed-upon method for the voluntary settlement of the dispute similarly lacks merit. Both Unions and the Employer are bound to the IJDB by virtue of their respective collective-bargaining contracts. However, since 1 June 1981 the IJDB has been inoperative, has ceased hearing such disputes, and is incapable of administering or policing a determination. No party to the dispute contends to the contrary. In these circumstances, we do not view the obligation of the parties herein to submit work disputes to the IJDB to be determinative. There is no other agreed-upon method for the resolution of the dispute to which all parties are bound.

We conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.⁷ The Board's determination in a jurisdictional dispute is an act of judgment based on common sense and experience reached by balancing those factors involved in a particular case.⁸

The following factors are relevant in making the determination of the dispute before us.

1. Collective-bargaining agreements

The Employer, at all times material, was signatory to a collective-bargaining agreement with the Plasterers. This agreement appears to cover the work in dispute. Thus, article 202 of the Plasterers contract provides that the following shall be the work of the Plasterers:

Olumbers Local 703 (Airco Carbon), 261 NLRB 1122, 1124 (1982); Carpenters Local 1862 (Jelco, Inc.), 184 NLRB 547 (1970).

All interior or exterior plastering including all cement stucco, scraffito, hardwall plastering, veneer plastering of all types, the application of acoustical or imitation acoustical finishes as well as the preparatory pointing and taping of drywall surfaces that are to receive these finishes, all dryvit systems including installation of all styrofoam applications for dryvit systems, the application and finishing of all marblecrete, flush or projected, whether interior or exterior, the application of all bonding agents and sealer coats.

The Employer is also signatory to a collective-bargaining agreement with the Carpenters that was signed 20 October 1982 and which runs from 1 June 1982 through 31 January 1986. This agreement also appears to cover the work in dispute. In this regard, section 201.2 of the Carpenters contract provides that the following shall be the work of the Latherers/Carpenters:

All work in connection with the installation, erection and/or application of all materials and component parts of wall and partitions regardless of their material composition or method or manner of their installation, attachment or connection, including but not limited to all floor and ceiling runners, studs, stiffeners, cross bracings, fire blocking, resilient channels, furring channels, doors and windows, including frames, casing moulding, base accessory trim items, gypsum drywall materials, laminated gypsum systems, backing board for all systems, including but not limited to thin coat and other finished systems, plastic and/or paint finished bases, finish board, fireproofing of beams and column, fireproofing of chase, sound and thermal insulation materials which includes installation of all backerboard and foam type insulation for insulating exterior wall systems, fixture attachments, including all layout work, preparation of all openings for lighting, air vents or other purposes, and all other necessary or related work in connection therewith.

Furthermore, the Respondent in the past had been signatory to a collective-bargaining agreement with Lathers Local 9374L. Sometime in 1979 Wood, Wire and Metal Lathers International Union, AFL-CIO, and the International Brotherhood of Carpenters and Joiners of America (Carpenters International) merged, with the Carpenters International emerging as the sole entity. In May 1982, Lathers Local 9374L merged with the Carpenters. The work description for lathing work in the Lathers contract was incorporated into the 1982 Carpenters agreement; i.e., section 201.2. The

¹ NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting), 364 U.S. 573 (1961).

Machinists Lodge 1743 (Jones Construction), 135 NLRB 1402 (1962).
 The most recent Plasterers agreement was from 1 June 1980 through 31 May 1983.

notice of the work assignment mailed to the respective Unions was dated 18 October while the Carpenters agreement was not signed until 20 October. The Plasterers seeks to make much of the fact that the assignment was made 18 October prior to the actual signing of the agreement. However, we do not view the fact that the assignment apparently was made during the period after the old contract had expired¹⁰ and while the new one was being negotiated as significant since the work in dispute is covered by both agreements. Further, the evidence indicates that at the time of the work assignment the Employer and the Carpenters had already agreed to the provision as to work jurisdiction. Otherwise the Employer would not have known on 18 October that both Unions had a colorable claim.

Since both contracts cover the work in dispute we find this factor does not favor the assignment of the work to the employees represented by either Union.

2. Agreements between the Unions

Contrary to the Plasterers position, the agreement between the International Unions (the Carpenters and the Plasterers) dating back to 1 May 1918 and submitted by the Plasterers as an exhibit does not resolve the dispute before us. That agreement involves the handling of cork as an interior insulation, whereas the work in dispute involves the installation of an exterior foam. Furthermore, those agreements were executed long before the development of this type of exterior wall insulation system.

Accordingly, we find that this factor does not favor an assignment of the disputed work to the employees represented by either Union.

3. Impartial Jurisdictional Dispute Board determinations

All parties introduced numerous decisions by the IJDB and its predecessor in an effort to establish that the work in dispute has been consistently awarded to the Plasterers or the Carpenters. The determinations are mixed. We find that this factor does not favor an award to the employees represented by either Union.

4. Industry and area practice

All parties introduced letters from other employers to establish that they utilized certain unions to perform this work. Some of the letters indicated that the employers preferred plasterers to do the

work in dispute while other letters indicated that they utilized carpenters to perform the work in dispute. One letter indicated that both crafts were utilized to perform this work. Also, representatives of other employers in the Phoenix area testified concerning their craft assignment. In this regard, although the Dryvit distributor for Arizona, Dennis Hopper, testified that, in order to be an applicator of Dryvit, a party must be an active plastering contractor, he also testified the mechanic who actually applies the foam could be a carpenter journeyman, a plastering journeyman, or a person who is not a journeyman, as long as they know how to apply the work. Further, although testifying that he had used plasterers to perform Dryvit work, Hopper stated that, if his company were structured as in the Employer's, he would assign this work to carpenters rather than to plasterers. Finally, two witnesses, Taylor and Foltz, an exbusiness agent of the Plasterers and business agent for the Plasterers, respectively, gave testimony that plasterers had been performing this type of work for the past several years in Arizona. However, several representatives of the Carpenters testified that the Carpenters have done Dryvit work in the past in Arizona. Thus, there is no clear area or industry practice. Inasmuch as area and industry practice is mixed, this factor does not favor the employees represented by either Union.

5. Past practice of the Employer

Charles Brickey Sr., contract coordinator for the Employer, testified that the G.T.E. project was the first Dryvit project for the Employer. However, he also testified that the Employer has used the Carpenters to install similar systems such as Nu-Wall and Thermalclad. Brickey testified that these systems differ from the Dryvit System in that, instead of using the nylon mesh over the foam, they use a wire mesh. Thus, since the system is the same, except for the exterior portion of the work which is not in dispute here, we find this factor favors assignment to employees of the Employer who are represented by the Carpenters.

6. Skills, training, and experience

The tasks of mixing adhesive, applying adhesive to the styrofoam, and placing the styrofoam panels against the exterior walls of buildings do not require extensive or specialized skill, training, or experience. Thus, these factors do not favor awarding the work to employees represented by either Union. 11 However, both the Employer and the

¹⁰ It is not clear from the record whether the Lathers contract had expired or been superseded. For the purpose of this discussion, we have assumed the facts most favorable to the Plasterers.

While Allen Foltz, business agent for the Plasterers, testified that he personally observed carpenters experiencing difficulty in performing the Continued

Carpenters contend that carpenters are better trained and more skilled in the tasks of reading blueprints and laying out the job. In this regard there is evidence that the carpenters, unlike the plasterers, are specifically trained in layout skills.

The Plasterers, on the other hand, still contends that employees represented by it have far the greater skill. In this regard, Dennis Hopper, president of Ora B. Hopper Company which is the distributor of the Dryvit product, testified that plasterers are most skilled in making the application most aesthetically pleasing. However, this testimony refers to the last step in the procedure which all parties agree is the work of the plasterers.

Thus, it appears that the carpenters' special skill in layout work favors awarding the disputed work to the employees of the Employer who are represented by the Carpenters.

7. The Employer's preference and assignment

The Employer originally assigned the disputed work to a composite crew of 50 percent carpenters and 50 percent plasterers. The Employer based its original assignment on its assumption that both crafts had a credible claim to the work and a composite crew assignment would best avoid any labor unrest on the project. Since the key reason for the composite crew assignment was not achieved, i.e., to prevent labor unrest, and as no party to the dispute wants a composite crew, we will not consider the Employer's original assignment in awarding the work in dispute. The Employer now prefers to assign all the work in dispute to its employees represented by the Carpenters. Accordingly, we find that this factor favors awarding the work to employees represented by the Carpenters.

8. Efficiency of operation

The Employer asserts that it would be more efficient to assign the work to the carpenters. However, except perhaps for the carpenters' greater skill in layout (discussed above), there is nothing to support a finding that either craft could do the work more efficiently. Thus, we find this factor does not favor awarding the work to employees represented by either Union.

Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that employees who are represented by the Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's past practice, relative skills, and the Employer's preference.

Accordingly, we shall determine the instant dispute by awarding the disputed work to employees represented by International Brotherhood of Carpenters and Joiners of America, Local 1327, but not to that Union or its members. Additionally, we find that Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 394, AFL-CIO, is not entitled by means proscribed under Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees represented by it.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

- 1. Employees of Arok Construction Co., Inc. who are represented by International Brotherhood of Carpenters and Joiners of America, Local 1327, are entitled to perform the installation of all types of polystyrene panels to the exterior walls of buildings, which panels are part of the building's insulation system, for the Employer on the G.T.E. project in Phoenix, Arizona.
- 2. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 394, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Arok Construction Co., Inc. to assign the disputed work to employees represented by it.
- 3. Within 10 days from the date of this Decision and Determination of Dispute, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 394, AFL-CIO, shall notify the Regional Director for Region 28, in writing, whether or not it will refrain from forcing or requiring Arok Construction Co., Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work to employees represented by International Brotherhood of Carpenters and Joiners of America, Local 1327.

work in dispute the morning of 6 December, representatives of the Employer testified that the Employer has utilized both crafts on the G.T.E. project to do the work without any problems in such areas.